

**Westlaw Delivery Summary Report for PAPENFUSE,EDWARD 5140691**

Date/Time of Request:	Monday, December 3, 2007 14:01 Central
Client Identifier:	1000210861
Database:	MD-CS-FIND
Citation Text:	51 A. 171
Lines:	217
Documents:	1
Images:	0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.

**C**  
 STATE v. COWEN et al.  
 Md. 1902.

Court of Appeals of Maryland.  
 STATE  
 v.  
 COWEN et al.  
 Jan. 15, 1902.

Appeal from circuit court, Washington county, in equity; Edward Stake, Judge.

Petition by John K. Cowen and others, trustees of bondholders, against the state of Maryland, for extension of time during which the petitioners were to possess and operate the Chesapeake & Ohio Canal in the interest of the bondholders under Act 1844, c. 281. From an order for petitioners, the state appeals. Affirmed.

West Headnotes

**Appeal and Error 30** ↪ **1099(1)**

**30** Appeal and Error

**30XVI** Review

**30XVI(M)** Subsequent Appeals

**30k1099** Questions Concluded

**30k1099(1)** k. In General.

**Most Cited Cases**

Decision on a prior appeal in the same cause and between the same parties that the state cannot have a sale of a canal for satisfaction of its liens waived in favor of bondholders secured by mortgage on the revenues till it clearly appears that the canal cannot be operated so as to produce revenue applicable to payment of the bonds is the law of the case.

**\*171** Argued before McSHERRY, C.J., and FOWLER, BRISCOE, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Atty. Gen. Rayner, for the State.  
 Hugh L. Bond, Jr., for appellees.

PAGE, J.

It is not necessary, in this opinion, to restate the facts connected with the origin of the Chesapeake & Ohio Canal Company, the creation of its property and indebtedness, or the successive steps in the litigation that this appeal again brings before us. All that has been exhaustively done in the several opinions in the two cases which are reported respectively in [73 Md. 484](#) et seq., [21 Atl. 374](#), and [83 Md. 551](#) et seq., [35 Atl. 161](#), [354](#), [581](#). In the first mentioned the original decree passed by the lower court was affirmed, this court there holding that the trustees of the bonds issued under the act of 1844 and secured by the several mortgages executed in pursuance of that act were, “by the default of the company to pay its indebtedness according to the terms of these mortgages, entitled to take possession of the canal upon the terms prescribed by the decree”; that this right existed as against the state; and that the said trustees ought to be allowed to put the property “in a condition to produce revenue.” The decree thus affirmed provided, among other things, for a sale of the property; but by the fifth section this provision was suspended for a period of four years, and the trustees of the bondholders, under Act 1844, c. 281, upon their compliance with and performance of certain terms and conditions, were authorized to proceed to operate the canal “as a public water way,” and apply the revenues, after current and ordinary expenses incurred in operating the canal and keeping it in working repair—First, to the expenses incurred by the receivers, the amounts expended to restore the canal; second, to whatever sums that were necessary to discharge liens superior to that of their own claim for labor and supplies, etc.; third, the interest accrued and to accrue, with the principal, of the bonds issued under the act

of 1878; and, lastly, to the principal and interest of the \*172 bonds issued under the act of 1844. When the last-mentioned bonds have been paid, their possession was to terminate. The decree further provided that if, at the end of four years, the revenue had not been sufficient to liquidate the amount of the cost of repairing the canal, the expenses and compensation of the receivers, and to pay "any amount" that might be a preferred lien on the tolls for labor and supplies furnished to the company, such failure in the tolls and revenues "shall be regarded as evidence conclusive (unless the time be extended by the court for good and sufficient cause shown) that the said canal cannot be operated, so as to produce revenue with which to pay the bonded indebtedness of said canal company; and further, whenever it shall clearly appear that the said canal cannot be operated by the said trustees, so as to produce revenue with which to pay the bonded indebtedness of said company, the right and power is hereby reserved to this court to order and direct the execution of the foregoing decree of sale." Upon the expiration of the four years mentioned in the decree the trustees, who had been operating the canal during that period, applied to the court below for an extension of six years more. At that time the net revenues had been far from sufficient to liquidate any of the claims against the company. Up to the 1st December, 1893, the receipts from net tolls, rents, and other sources was \$270,970.73, while the expenditures for other accounts than the repair of the canal were \$250,327.17. The trustees in their report showed to the court that the extent of the repairs required delayed traffic for a considerable time; that by reason of long disuse the canal, as a business enterprise and means of transportation, had become discredited at the time they had received possession; but that they had carried on the

work of repair, and the canal was then in "better condition as a water way than ever before in its history." They also reported that they had negotiated a contract with the Chesapeake & Ohio Transportation Company of Washington County whereby the trustees were guaranteed a net fixed income of not less than \$100,000. The lower court approved of the agreement, and extended the period as prayed. On appeal this court reaffirmed what had been decided in the prior appeal, and affirmed the order of the lower court. *Canal Co.'s Case*, 83 Md. 570, 35 Atl. 163, 354, 581. The court, by Judge Fowler, said it was held in the former appeal that "not to have granted the appellees possession of and time to operate the canal for the benefit of their cestuis que trustent would have been inequitable, as well as illegal, under the then existing circumstances.\*\*\* If it was inequitable to deny the appellees possession of the canal in 1891, we think it would be even more so now, when, in addition to the loss they would have sustained by a sale, they would, according to the state's contention, now lose also the large amount they were authorized under the decree to spend in repairs and restoration.\*\*\* The state cannot maintain its right to a sale upon any fair or reasonable construction of the act of 1844 (chapter 281), its mortgage of January 8, 1846, and that of the appellees of June 5, 1848, which together contain the contract between the canal company, the state, and the bondholders of 1844. Certainly, no right to such a sale can be enforced until it appears that the cestuis que trustent can receive nothing on account of their claims from the operation of the canal by the appellees." We have quoted freely from these opinions because of the fact that this appeal brings before us an additional proceeding in the same cause between the same parties, and affecting the same subject-matter. Whatever, therefore, has been defin-

(Cite as: 94 Md. 487, 51 A. 171)

itely decided by this court in the prior appeals should be regarded as settled, and the principles upon which such decision rests should be taken, as far as applicable, to control the questions now before us. They should be held to constitute the "law of the case," binding alike upon this court as upon the court below. In [McLaughlin v. Barnum](#), 31 Md. 446, it was said by this court that a decision by this tribunal upon every point "to which it appears the judicial mind was applied and which was considered, adjudged, and reached as a conclusion of the court, is not only of the same authority as any other decision of the appellate court, but on this appeal in the same cause, under the same parties, when the same relief is sought upon the same subject-matter, and where the case is in no respect variant from that presented on the first appeal, has become the law of the case in its further progress, binding upon this court as well as the court below." [Young v. Frost](#), 1 Md. 395; [Hammond's Lessee v. Inloes](#), 4 Md. 164; [Thomson v. Albert](#), 15 Md. 282; [Mitchell v. Mitchell's Lessee](#), 6 Md. 234; [Preston v. Leighton](#), Id. 97. In [Iron Co. v. Sherman](#), 20 Md. 131, it was said to be a "cardinal maxim of justice and jurisprudence that the court should adhere to its own decisions in the same cause and between the same parties." [Alexander v. Worthington](#), 5 Md. 471; [Mong v. Bell](#), 7 Gill, 246. The opinion of the court in 73 Md., 21 Atl., supra, was concurred in by all the judges who sat in the case. In the other case (83 Md., 35 Atl.) the rulings were made by a majority only. But whatever may have been the views of the individual members of the court at the times those cases were decided, or whatever they may now entertain as to the particular questions then passed on, the principle then established and enforced by the rendition of judgment not having been expressed by way of illustration or in argument only, but

in direct and positive terms \*173 as applicable to the questions then before them for adjudication, constitutes the law of this case, binding upon all the parties, the court below and this court.

Now, being so guided, what are the conditions of fact upon which the decree for the sale of the canal can be enforced? This court in 83 Md. 577, 35 Atl. 164, 354, 581, has very clearly answered that question. "When it appears," says the court, "and not till then, that the property cannot be operated so as to produce revenue applicable to the payment of the bonded indebtedness of the company, then, under the provisions of the decree affirmed by this court, the court may be asked to decree a sale under the state's mortgage. Until that time—in other words, until it 'clearly appears' that the liens of the appellees are valueless, and can, therefore, neither be lessened or impaired—a sale \*\*\* can be supported upon no ground legal or equitable." Can it be reasonably determined from anything that is before us that the lien has now become valueless? Has it been demonstrated, as contended by the state, that the canal can never be operated so as to produce revenue that can be applied to any of the bonded indebtedness of the company? Such conclusions most certainly cannot be reached if the facts set forth in the report of the trustees be accepted; and there is nothing in the record that in any respect casts doubt upon what they have there stated. They report that the total sum borrowed, including interest, to defray the cost of repairing and restoring the canal, amounted to \$674,922.64, of which, out of net revenues, they have paid \$553,922.64, leaving still unpaid on that account the sum of \$121,000. If the same net income be received during the next four years, not only will the amount due for cost of repairing and restoring the canal have been entirely liquidated, but there will be a considerable balance to be applied as

provided by the decree. Should the period for the suspension of the decree for a sale be still further extended, and the same net revenue be received, the trustees would, at a day not far distant, be in a position to pay to the bondholders of 1844 at least a part of what may be then due them. Nor is it unreasonable to suppose that the net income will be any less during the next four years. The trustees further report that "the canal is now in the highest state of efficiency at any time since its construction"; that "the general maintenance of reasonable transportation charges by the railroad companies that serve either the same coal fields from which the canal derives its traffic or coal fields competitive with those of the canal makes it possible to transport coal on the canal, both for local consumption or coast-wise shipment, on tolls and charges remunerative to the canal and all engaged in canal transportation." They further report that the Chesapeake & Ohio Transportation Company of Washington County is willing and has agreed that their contract shall run the full 10 years, and that the guaranteed income to be derived through it will not only provide for the payment of the unpaid balance of the money borrowed for restoring the canal, but also a fund not less than \$350,000 "for distribution to such interests as the court may find entitled to the same." Under these circumstances we cannot find the conditions of fact that must exist before we can order the sale of the property. We cannot decide that the lien of the appellees is valueless, or that the property cannot be operated so as to produce revenue applicable to the bonded indebtedness of the company. No valid objection has been shown why the continuance of the contract with the transportation company should not be permitted, and there is certainly nothing in the present condition of the canal or in the prospect of revenue for the future that would warrant us, in the face

of the decisions of this court heretofore made, in depriving the trustees of the right to use and operate the property as provided by the original decree.

The order of the lower court will therefore be affirmed. Order affirmed and remanded.

BRISCOE, J., dissents.  
Md. 1902.  
State v. Cowen  
94 Md. 487, 51 A. 171

END OF DOCUMENT